

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICHARD FRANKLIN

Plaintiff,

vs.

GOVERNMENT EMPLOYEES
INSURANCE COMPANY, a Maryland
Corporation and GEICO GENERAL
INSURANCE COMPANY, A Maryland
Corporation,

Defendants.

Case No.: 3:10-cv-05183-BHS

**COMBINED JOINT STATUS REPORT
AND DISCOVERY PLAN**

Pursuant to Fed. R. Civ. P. 26(f), Local Rule CR 16 and this Court's March 18, 2010 Minute Order, the parties provide the Court with this Combined Joint Status Report and Discovery Plan.

1. Nature and Complexity of the Case

(A) Plaintiff's Statement

Plaintiff has alleged that the Defendants breached the uninsured/underinsured provisions of Plaintiff's and Class Members' insurance policies by failing to inform Plaintiff

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1 and Class Members of their right to recover diminished value, failing to inspect their damaged
2 vehicles for diminished value loss and failing to compensate Plaintiff and members of the
3 putative class for the diminished value loss their vehicles sustained from having incurred
4 paint, body and/or structural damage incapable of complete and full repair.

5 Plaintiff seeks certification of a Rule 23(b)(2) Class because the primary relief
6 Plaintiff requests is an order directing Defendants to specifically perform their contractual
7 obligations, including notifying Class members of their diminished value coverage,
8 reassessing their claims to identify any diminished value loss and compensating Class
9 members in accordance with the applicable State law. Specific performance is much more
10 certain, prompt, complete, efficient and manageable than a damages award because, *inter alia*,
11 Defendants bear the burden of assessing each Class member's diminished value loss
12 according to the applicable laws where they do business – a burden they have contractually
13 assumed but failed to perform. Certification of a Rule 23(b)(2) specific performance Class
14 eliminates the need for the Court to determine how diminished value is measured in each state
15 or the amount of diminished value compensation, if any, owed to each Class member.
16 Alternatively, Plaintiff seeks certification of a Rule 23(b)(3) damages Class because all states
17 recognize that diminished value is a compensable loss.

18 **(B) Defendants' Statement**

19 This is a putative, nationwide class action against Government Employees Insurance
20 Company and GEICO General Insurance Company. The named Plaintiff, Richard Franklin,
21 on behalf of himself and other insureds of the Defendants, alleges that Defendants breached
22 the uninsured/underinsured motorist ("UM/UIM") property damage ("UMPD") coverage
23 provisions of his automobile insurance policy because Defendants did not pay UMPD benefits
24 for "diminished value" allegedly sustained by Plaintiff's auto in a November 1, 2008 auto
25 accident. Plaintiff seeks compensatory damages for breach of contract, "equitable

1 compensation,” class representative “incentive fees,” post-judgment interest, and declaratory
2 and injunctive relief. Plaintiff seeks class certification under Fed.R.Civ.P. 23(b)(2) and in the
3 alternative, under Fed.R.Civ.P. 23(b)(3). Plaintiff proposes that the class will be comprised of
4 insureds of the Defendants who received UMPD insurance benefits and benefits under
5 Comprehensive and Collision Property Damage coverage. Defendants contend that class
6 certification under either Rule 23(b)(2) or (b)(3) is inappropriate in this case. Further,
7 although Plaintiff seeks class certification under Rule 23(b)(2), an examination of the
8 injunctive and declaratory relief sought in the Complaint demonstrates that monetary
9 damages, not injunctive relief, are the primary and predominant relief sought by Plaintiff on
10 behalf of the class.

11 On November 1, 2008, Plaintiff Richard Franklin was an insured under a Washington
12 family automobile insurance policy issued by one of the Defendants, GEICO General Ins. Co.
13 (“GEICO General”), (Policy No. 4044-84-57-68) and such policy contained UMPD coverage
14 for a 2006 Mazda 4x2 Sport. Franklin reported an insurance claim for the November 1, 2008
15 accident (Claim No. 0284851100101057). Plaintiff did not and does not have an insurance
16 policy with Defendant Government Employees Insurance Company. During the adjustment
17 of Claim No. 0284851100101057, GEICO General attributed 100% of the fault to the third
18 party tortfeasor involved in the accident. The estimate to repair the damage to Franklin’s
19 vehicle was \$5,098.46. GEICO General paid \$4,998.46 for the repairs to Franklin’s vehicle
20 under the UMPD coverage provisions of his policy. No insurance benefits were paid to
21 Plaintiff for Claim No. 0284851100101057 under the Collision or Comprehensive Property
22 Damage coverage provisions of Plaintiff’s policy. Plaintiff’s \$100 UMPD deductible was paid
23 to Plaintiff by the third party tortfeasor.

24 After the repairs were made to Plaintiff’s vehicle, Plaintiff sought \$3,788.00 in
25 additional UMPD benefits from GEICO General for the alleged “inherent diminished value”

1 of his vehicle. GEICO General re-inspected Plaintiff's vehicle and determined that all repairs
2 were performed in accordance with the estimate and the quality of workmanship met
3 generally accepted industry standards. GEICO General disagreed with Plaintiff's opinion that
4 his vehicle had sustained any inherent diminution in value. However, because Plaintiff is a
5 valuable customer, GEICO General offered Plaintiff an additional \$2,500 in UMPD benefits
6 to settle Plaintiff's claim. To date, Plaintiff has not accepted this offer of additional UMPD
7 benefits.

8 Defendants deny that they have breached the UMPD provisions of Plaintiff's contract,
9 deny that they have failed to fulfill any contractual or other duty to Plaintiff, dispute that all
10 vehicles necessarily suffer an "inherent diminution in value" that cannot be restored simply
11 because they are in an accident, dispute that Plaintiff's vehicle sustained "inherent diminished
12 value" from the November 1, 2008 accident, deny that Plaintiff is entitled to any additional
13 contract benefits, damages, equitable compensation or other monetary compensation, and
14 deny that Plaintiff is entitled to any declaratory or injunctive relief. Defendants further deny
15 that Plaintiff has standing to sue Defendant Government Employees Insurance Company as
16 Plaintiff did not have an insurance policy with that Defendant, and deny that Plaintiff has
17 standing to sue either Defendant on the basis of payment of Collision and/or Comprehensive
18 Property Damage coverage benefits as Plaintiff's November 1, 2008 claim did not involve
19 those coverages and Plaintiff was not paid benefits from those coverages, and deny that
20 Plaintiff can represent a class of claimants against Governments Employees Insurance
21 Company or either Defendant based on the mischaracterization claim. On these bases,
22 Defendants have filed a motion to dismiss under Rule 12(b)(1), which is now fully briefed.

23 24 **2. The Results of the FRCP 26(f) Conference.**

25 The parties have agreed upon a discovery plan, as detailed below.

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3. Proposed Deadline for Joining Additional Parties

The parties suggest that the deadline for joining additional parties be 45 days after the Court has ruled on Defendants' motion to dismiss or not later than September 1, 2010.

4. Statement Regarding ADR Method to be used or Statement that there should be no ADR.

The parties agree that non-binding Mediation would be an acceptable ADR method.

5. Statement Regarding Time When Mediation or Other ADR Proceeding Should Take Place.

The parties suggest that non-binding ADR be set as part of the trial schedule set after the Court rules on Plaintiff's Motion for Class Certification and according to the customary practice of this Court.

6. Proposed Discovery Plan

(a) The date on which the FRCP 26(f) conference and FRCP 26(a) initial disclosures took place;

The Rule 26(f) conference of the parties was held on June 24, 2010 by telephone. Counsel for the Plaintiffs in attendance were: Debra Brewer Hayes, Reich & Binstock. Counsel for Defendants in attendance were: Meloney Cargil Perry, Meckler Bulger Tilson Marick & Pearson, LLP, and Michael Madden, Bennett Bigelow & Leedom, P.S. The parties have served or will serve their respective Rule 26(a)(1) Initial Disclosures not later than July 9, 2010.

(b) The subjects on which discovery may be needed and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

The parties are in agreement that initial discovery should be focused on matters relevant to class certification and that a period of approximately nine months should be allocated for the purpose, provided that discovery relative to class issues shall not be duplicated during merits discovery. If and when a class is certified, the Court should set a schedule for resolution on the merits, including merits discovery, dispositive motions and trial. The parties further agree that discovery should commence on the next business day that is at least 15 days after the Court has ruled on Defendants' motion to dismiss.

(c) What changes should be made in the limitations on discovery imposed under the Federal and Local Civil Rules and what other limitations should be imposed;

The parties do not anticipate the need for changing the limitations on discovery imposed under the Federal and Local Civil Rules or any other limitations at this time.

(d) A statement of how discovery will be managed so as to minimize expense (e.g. by forgoing or limiting depositions, exchanging documents informally, etc.); and

The parties and their respective counsel are experienced in matters of this nature, including specifically class claims for recovery of alleged diminished value, and will use that experience to expedite and minimize discovery expense.

(e) Any other orders that should be entered by the Court under FRCP 26(c) or under Local Rule CR 16(b) and (c).

The parties anticipate that they will be able to manage issues concerning confidential or propriety information by stipulation.

7. The date by which the remainder of discovery can be completed.

The parties propose that class discovery be completed by April 1, 2011. The parties further propose that the Court establish dates for service of expert reports under Rule 26(a)(2)(B) as follows:

- Plaintiff November 5, 2010
- Defendant December 20, 2010
- Plaintiff rebuttal (if any) January 19, 2011

8. Consent to Assignment of this case to a full-time U.S. Magistrate Judge?

The parties do not agree to a magistrate judge.

9. Whether the case should be bifurcated by trying the liability issues before the damages issues, or bifurcated in any other way.

The parties have agreed to focus on class certification during this initial stage. The parties recognize there will be overlap between class certification issues and liability issues and thus, do not propose any formal bifurcation. The parties propose the following schedule for consideration of class certification:

- Plaintiff's Motion for Class Certification to be served and filed not later than May 6, 2011 and noted for July 8, 2011.
- Defendants' Opposition to be served and filed not later than June 13, 2011.
- Plaintiff's Reply to be served and filed not later than July 8, 2011.

10. Whether the pretrial statements and pretrial order called for by Local Rules CR 16(e), (h), (i) and (l) and 16.1 should be dispensed with in whole or in part for the sake of economy.

The parties do not have a position on this issue at this time. The question should be addressed following a ruling on class certification.

11. Any other suggestions for shortening or simplifying the case.

The parties do not have any other suggestions for shortening or simplifying the case.

12. The date the case will be ready for trial.

A case schedule leading up to the setting of a trial date should be established following a ruling on Plaintiff's motion for class certification.

13. Whether the trial will be jury or non-jury.

Plaintiff and Defendants have requested that this case be tried to a jury.

14. The total number of trial days required.

The parties are not certain at this time as to the number of days it will take to complete a trial of this matter.

15. The dates on which trial counsel may have complications to be considered in setting a trial date.

Not applicable.

16. Whether this case should be considered for designation for trial at the Federal Building in Vancouver, WA (which cannot accommodate a jury trial).

The parties agree that the case should be heard in Tacoma.

17. Statements regarding service on parties.

All defendants have been served.

Respectfully submitted this 7 day of July 2010.

ATTORNEYS FOR PLAINTIFF

/s/ Debra Brewer Hayes

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CERTIFICATE OF SERVICE

I hereby certify that on July 7th, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

s/ Debra Brewer Hayes

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